

## Elder Law for the Non Elder Law Attorney: Part II

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### **Emerging Issues**

#### **AIP's Right to Counsel**

- In a guardianship proceeding under MHL Article 81, the AIP has a right to counsel when the petition requests the appointment of a temporary guardian. *Matter of Azzi*, 141 AD3d 1159 (4<sup>th</sup> Dept. 2016). See also MHL 81.10(c)(5) (requiring a court to appoint counsel when a petition requests the appointment of a temporary guardian unless the court is satisfied that the AIP is represented by counsel of his or her own choosing).
- In a guardianship proceeding under SCPA Article 17-A, an indigent proposed ward is entitled to appointed counsel. *Matter of Leon*, 2016 N.Y. Misc. LEXIS 3493 (Surr. Ct., Kings Co., 2016) (“Given that the right to assigned counsel is recognized in a myriad of quasi-criminal and civil proceedings, ranging from military eviction and child custody, to involuntary commitment and employment litigation, there is no question that in Article 17-A proceedings, where a person's decision-making authority in every aspect of life is at stake, constitutional protections are warranted.”) See also SCPA § 407(b) (granting the Surrogate Court authority to appoint counsel in any case where the judge “determines that such assignment of counsel is mandated by the constitution of this state or of the United States”).

#### **Constitutionality of Guardianships Pursuant to SCPA Art 17-A**

- On September 21, 2016, the Disability Rights New York filed suit against New York State, the Unified Court System of the State of New York seeking to enjoin New York State from appointing guardianships pursuant to SCPA 17A. The complaint alleges Article 17-A violates the Fifth and Fourteenth Amendments to the United States Constitution, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act of 1973 (Section 504) because it terminates an individual's decision making rights (including the right to vote, and the rights to choose/seek medical treatment, where to work and live) without regard to the individual's wishes, without requiring the individual be present at the hearing, and without providing the individual a right to be represented by counsel. *Disability Rights New York v. New York State, et al.*, 1:16-cv-07363-AKH, (S.D.N.Y., filed on Sept. 21, 2016). The oral arguments on this matter are currently scheduled for August 21, 2017 before Hon. Alvin Hellerstein in the Southern District.

## **Special Needs Trust Fairness Act**

- Section 5007 of the 21st Century Cures Act (signed by former Pres. Obama on December 13, 2016) amended Section 1917(d)(4)(A) of the Social Security Act to allow “exception trusts” created for the benefit of disabled individuals under age 65 to be established by the disabled individual. Previously, such trusts were required to be established by a parent, grandparent, legal guardian, or court of competent jurisdiction. A bill (still pending) was introduced in the New York Legislature to make a conforming change to Section 366(2)(b)(2)(iii) of the Social Services Law (SSL), and allow certified disabled individuals who are under age 65 to establish their own special needs trust and qualify for the exceptions to Medicaid income and resource counting rules as outlined in Section 366 of the SSL and Department regulations at 18 NYCRR 360-4.5(b)(1)(5)(i)(a). On May 22, 2017, the DOH released policy directive instructing local districts to allow disabled individuals under the age of 65 to establish their own SNTs. It states:

In the case of a certified disabled Medicaid applicant/recipient, districts must not consider as available income or resources the corpus or income of a trust established by such disabled individual when he or she was under 65 years of age, provided the trust otherwise complies with the “exception trust” provisions set forth in 96 ADM-8, “OBRA ’93 Provisions on Transfers and Trusts.”

GIS 17 MA/08.

## **Right to privacy**

- Sealing records in a guardianship proceeding under MHL Article 81 – In determining whether seals records pursuant to MHL § 81.14(b), a court must carefully balance the public’s First Amendment rights against the privacy rights of the AIP. *Matter of Astor, 13 Misc. 3d 1203(A) (Sup. Ct., N.Y. Co. 2006)*. See also MHL § 81.14(b) (stating that a court may only seal a file in an Article 81 proceeding upon a “written finding of good cause, which shall specify the grounds thereof.”); MHL § 81.14(c) (“The court shall not exclude a person or persons or the general public from a proceeding under this article except upon written findings of good cause shown.”). “In determining whether good cause has been shown, the court shall consider the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated.” MHL §81.14(b) and (c).

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## **Questions? Contact us at:**

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